IN THE

Supreme Court of the United States

OCTOBER TERM, 1962

No. 140

NATHAN WILLNER,

Petitioner-Appellant,

against

COMMITTEE ON CHARACTER AND FITNESS, APPELLATE DIVISION OF THE SUPREME COURT OF THE STATE OF NEW YORK, FIRST JUDICIAL DEPARTMENT,

Respondent-Appellee.

CROSS-MOTION TO DISMISS

LOUIS J. LEFKOWITZ,
Attorney General of the State of New York,
Attorney for Respondent-Appellee,
Office & P. O. Address,
80 Centre Street,
New York 13, New York.

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Cross-Motion to Dismiss.

NATHAN WILLNER,

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COMMITTEE ON CHARACTER AND FITNESS, APPELLATE DIVISION OF THE SUPREME COURT OF THE STATE OF NEW YORK, FIRST JUDICIAL DEPARTMENT,

Respondent-Appellee.

SIRS:

PLEASE TAKE NOTICE, that on the affidavit of Daniel M. Cohen, Assistant Attorney General of the State of New York, verified October 10, 1962, the respondent will cross-move this Court on the 12th day of October, 1962 at its Courthouse in the City of Washington, D. C. for an order

dismissing the appeal taken herein by the petitioner upon the ground that certiorari was granted improvidently herein.

Yours, etc.,

LOUIS J. LEFKOWITZ,
Attorney General of the
State of New York,
Attorney for Respondent-Appellee,
Office & P. O. Address,
80 Centre Street,
New York 13, New York.

To:

HON. JOHN F. DAVIS,
Clerk,
United States Supreme Court,
United States Supreme Court House,
Washington 25, D. C.

HENRY WALDMAN, Esq.,
Attorney for Petitioner-Appellant,
5 Beekman Street,
New York 38, New York.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1962

No. 140

Affidavit.

NATHAN WILLNER,

Petitioner-Appellant,

against

COMMITTEE ON CHARACTER AND FITNESS, APPELLATE DIVISION OF THE SUPREME COURT OF THE STATE OF NEW YORK, FIRST JUDICIAL DEPARTMENT,

Respondent-Appellee.

STATE OF NEW YORK }
COUNTY OF NEW YORK } ss.:

DANIEL M. COHEN, being duly sworn deposes and says:

1. He is an Assistant Attorney General of the State of New York and has been assigned to the defense of the appeal taken to the United States Supreme Court by the petitioner-appellant herein.

2. This affidavit is made in support of a motion to dismiss the appeal taken herein upon the ground that facts which came to the attention of the deponent *after* the date when certiorari was granted seem to indicate that certiorari was granted improvidently.

A.

3. It was not until after certiorari had been granted that deponent ascertained that *no* record or transcript of the proceedings in the New York courts had been filed by the petitioner in connection with this petition for certiorari.

4. Apparently petitioner made no effort to supply even the Court with the certified copy of a transcript of the record which is required by Rule 21 of the Rules of this Court.

5. Deponent had no knowledge at the time the brief in opposition to certiorari was filed of the facts of this case except as those facts were set forth in the brief in opposition to certiorari, for the reason that the Attorney General's office was not requested by the New York Appellate Division to appear in this matter until after the service of the petitioner's application for certiorari and the Attorney General was supplied by the Appellate Division with only the summary of facts set forth in said brief.

6. Until then, the proceedings, which had not been of an adversary nature, were purely judicial. Even upon the appeal to the Court of Appeals of the State of New York, the Appellate Division of New York's Supreme Court simply transmitted its complete file in the case to the Court of Appeals (Cross-Desig., Item 94). Oral argument in the New York Court of Appeals by the petitioner's counsel was completely unopposed (11 N. Y. 2d 956; and see Appendix B to the Petition for Certiorari).

B.

7. *After* this Court granted certiorari, the Appellate Division file in the case was made available to the deponent. Examination of this file by deponent disclosed that there had been *no testimony by complainants* against

the petitioner at any of the hearings of the Character Committee at any time. The only testimony given before the Committee in 1937 and 1938 in connection with the petitioner's original application for admission to the New York Bar had been given by the petitioner and by his wife, both of whom testified in favor of his application. The Character Committee report in connection with such application indicates that at least in part the petitioner's application was denied by reason of his failure to reply to questions affecting his character with appropriate *candor*. Letters of complaint against the petitioner had been received by the Committee, but by reason of *admissions* made by the petitioner and by reason of his lack of candor with the Committee, the Committee apparently never deemed it necessary to summon the complainants as witnesses. *Denial of the petitioner's 1937 application for admission to the Bar was predicated upon the record which the deponent himself had made before the Committee.*

8. In any event, whatever possible constitutional quarrel the petitioner may have had with the disposition of his 1937 application would appear to have been dissipated by reason of the fact that *in 1948 he was permitted to file a new application for admission to the Bar.* The Character Committee rejected this application, too, and again refused to certify that it was satisfied with his character. One reason for such dissatisfaction appears to have been the petitioner's failure to supply information requested by the Committee, particularly with relation to a complaint that he had *testified falsely* in a civil action concerning an issue as to whether he was an active member of a Certified Public Accountants' society. This issue was not a political issue and did not concern any issue of freedom of association or the right to be a member of the professional society. The issue before the Character Committee was simply one as to whether the petitioner had testified fasely or truthfully as to the fact of his paid-up membership.

The petitioner appears to have been apprised of this issue at the hearings at which he testified personally in 1948 and he appears to have *admitted* that he was not then a member of the professional society in which he had testified he was a member.

9. In connection with the Committee's 1948 action, it also appears that consideration was given to vituperative letters written by the applicant, Willner, to numerous persons concerning the Character Committee and its members. Willner *admitted* before the Committee that he had written the letters.

10. The entire file of the Appellate Division was transmitted to the New York Court of Appeals in connection with the petitioner's 1962 appeal to the Court of Appeals. There appear to have been included in this file all of the papers which have been listed in the amended cross-designation dated October 5, 1962 filed with the Clerk of this Court.

C.

11. The attorney for the petitioner was informed by the deponent on October 2, 1962 by telephone that the deponent intended to prepare and file with this Court an amended cross-designation which would specify all of the papers which had been considered by the Appellate Division and that had been transmitted to the Court of Appeals of the State of New York. The cross-designation was served by mail on October 5, 1962. It contains 96 items including an item (94) which discloses that the entire Appellate Division file in connection with the petitioner's applications for admission to the New York Bar was transmitted to the Court of Appeals pursuant to the request of the Clerk of the New York Court of Appeals "to assist the Court of Appeals in deciding the appeal taken by Willner".

12. On October 5, after the cross-designation had been served by the Attorney General by mail, there was received at the office of the Attorney General a motion by the petitioner to compel the Clerk of this Court to print solely the papers specified in the petitioner's "designation". These papers apparently relate solely to petitioner's application for leave to renew his application for admission to the Bar pursuant to Rule I of the New York Rules of Practice. Obviously, such papers alone would not constitute a fair representation of the record upon which that application for leave to renew was disposed of by the Court of Appeals when as a matter of fact the Court of Appeals had had before it the complete file of the Appellate Division.

13. Deponent respectfully requests that this affidavit be considered not only in support of the respondent's motion to dismiss this appeal, but also in opposition to the petitioner's motion to require the Clerk to print the record including *only* those papers which had been furnished and designated by the petitioner. The record in the possession of the Clerk of this Court upon which the petitioner seeks to proceed is incomplete.

14. Deponent has requested the Clerk of the Appellate Division, First Department to transmit to the Clerk of this Court without delay the same complete file which had previously been transmitted to the Clerk of the Court of Appeals of the State of New York. The Appellate Division Clerk has assured deponent this will be done. Deponent respectfully submits that a careful examination of this file will disclose that there was *an adequate State basis* for the denial of the petitioner's motion for leave to renew his application for admission to the Bar. It will disclose, too, that after the alleged unconstitutional rejection of his original application for admission to the New York Bar, New York afforded the petitioner a complete review by granting him an opportunity to re-

apply in 1948. At that time his application appears to have been denied, not by reason of any *ex parte* complaints, but by reason of his own admissions before the Committee, his own misconduct in issuing unrestrained and vitriolic letters concerning Committee members and by reason of his failure to supply information to the Committee concerning his status as a member of a society of professional accountants. Although the prior *history* of the petitioner's applications was referred to in the Committee's 1948 report he had, nevertheless, been granted a rehearing and the basis for petitioner's rejection appears to have been the petitioner's own misconduct in several capacities: as a writer of incontinent letters; as a witness who testified in civil actions without regard to factual accuracy; and as a witness before the Character Committee who dealt with the Committee without appropriate candor or respect for its requests for appropriate and pertinent information.

D.

15. The petitioner-appellant *appeared in person* before sub-committees of the Committee on Character and Fitness of the Appellate Division of the New York Supreme Court on several occasions. The Committee members were able to observe the petitioner's demeanor and to judge his credibility as a witness. Presumably, they also performed their functions as judges of his character. The New York courts have had before them, in their consideration of the petitioner's application for leave to renew his prior application for admission to the Bar, the entire history of this case. *The petition for certiorari was submitted to this Court, however, solely upon the basis of conjecture and surmise* (Petition, p. 4). With the entire file in this case now before this Court, as it was before the New York Courts, we respectfully submit that reconsideration should be had by the Court of its allowance of certiorari.

WHEREFORE, deponent prays for an order vacating and setting aside the prior order of this Court granting certiorari and further directing that the appeal taken herein be dismissed upon the ground that certiorari was improvidently granted.

DANIEL M. COHEN,
Assistant Attorney General
of the State of New York.

Sworn to before me this
10th day of October, 1962.

SAMUEL A. HIRSHOWITZ,
First Assistant Attorney General
of the State of New York.